

DW 04-048

CITY OF NASHUA

RSA 38 Proceeding re Pennichuck Water Works

Order Denying Motion to Compel Discovery

O R D E R N O. 24,654

August 7, 2006

The New Hampshire Public Utilities Commission (Commission) opened this docket to consider the petition of the City of Nashua (Nashua) to take certain assets of Pennichuck Water Works (PWW) pursuant to the municipalization process authorized by RSA 38. Now pending is a motion to compel discovery submitted by PWW against the City.

PWW filed its motion on March 16, 2006, seeking to compel Nashua to provide responses to several data requests to which Nashua had objected. Nashua submitted its written opposition to the motion on March 27, 2006, with a correction filed on March 31, 2006. On April 19, 2006, by secretarial letter, the Commission designated Hearings Examiner Donald M. Kreis to hear the parties, report the facts and make recommendations to the Commission pursuant to RSA 363:17 as to the disposition of the motion. The Commission scheduled a discovery conference before the hearings examiner on April 28, 2006.

As reported by the hearings examiner in his letter of April 28, 2006, the discovery conference took place as scheduled. Mr. Kreis indicated there had been significant progress toward resolving the discovery disputes outlined in the PWW motion and, thus, he deferred making a recommendation pending further discussions between PWW and Nashua. On May 24, 2006, the hearings examiner reported that PWW and Nashua had resolved all but one of the issues raised by the PWW motion. Mr. Kreis outlined the remaining issue in his letter, described

the positions of the two parties and recommended that the Commission grant the motion to compel discovery.

Absent any objection by either PWW or Nashua as to the hearings examiner's characterization of the status of the motion, we treat the motion as having been withdrawn except as to the issue that was the subject of his substantive recommendation. The remaining dispute concerns PWW's request to discover certain documents related to the negotiations that preceded Nashua's signing of written contracts with two firms, identified in the pleadings as Veolia and R.W. Beck, providing for the operation of the water system Nashua plans to acquire from PWW.

PWW's chief argument in support of its motion is that the information in question is likely to show what costs Nashua and its advisors believe the city would incur by using third-party contractors. According to PWW, the contracts themselves are not final and, therefore, there is limited information that would allow the parties to understand how Nashua plans to address operational issues and pay the related expenses. PWW also points out that two of Nashua's witnesses assisted the city with the negotiations, thus making them fact witnesses to a business transaction.

In opposition to the motion, Nashua points out that it has already furnished PWW with two drafts of each contract. Nashua also draws the Commission's attention to its decision in *Public Service Company of New Hampshire*, 89 NH PUC 226 (2004) (Order No. 24,310). In Order No. 24,310, the Commission resolved a discovery dispute by denying a motion to discover information about a utility's negotiations with contractors involved in a project to construct a new boiler. The project costs were to be borne, at least in part, by the utility's energy customers. The Commission denied the motion to compel discovery, concluding that, in contrast to the

contracts that resulted from the negotiations, it could conceive of no circumstances in which information related to the confidential negotiation of the contracts would be admissible. *Id.* at 230. According to Nashua, the circumstances of the instant discovery dispute are indistinguishable from those discussed in Order No. 24,310.

We agree, notwithstanding the hearings examiner's recommendation to the contrary. As we noted in Order No. 24,310, the rule for when discovery is appropriate in proceedings before the Commission is a liberal one: "[D]iscovery should be relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 229 (citation omitted). At the same time, the standard outlined in Order No. 24,310 does not exempt discovery requests from principles of reasonableness and common sense. *See, e.g., State v. Barnes*, 150 N.H. 715, 719 (2004) (holding that, even in a criminal case, discovery decisions will be sustained unless "untenable" and "unreasonable"); *McDuffey v. Boston & Maine R.R.*, 102 N.H. 179, 181 (1959) ("While the use of discovery in this state has been regarded as a remedial device which has been given a liberal application, we have attempted to indicate that it is subject to limitations") (citations omitted).

We do not perceive circumstances in which information about the negotiations that led to the contracts themselves would become part of the record in this proceeding. In arguing to the contrary, PWW notes that information about the negotiations could shed light on how the negotiating parties viewed the likely costs of the matters covered by the contract. This is true but does not change the outcome. Essentially the same situation arose in connection with Order No. 24,310, where the party seeking the discovery was concerned about the extent to which the utility had been forthcoming about project costs for which it would seek recovery in rates.

There, as here, the facts that drive the Commission's ultimate decision relate to the costs themselves, as fixed by the contracts in question, regardless of how the contracting parties may have regarded them during contract negotiations and regardless of whether the assumptions that drove such negotiations are at variance with public statements.

Although this is obviously an important case, the amount of discovery, including the numerous depositions that have taken place, in this docket is fairly described as encyclopedic. If it were clear that the heart of this case lay in what transpired during the confidential negotiations, discovery of the information might be appropriate, but, as noted above, that is not the case

Based upon the foregoing, it is hereby

ORDERED, that the March 16, 2005 motion of Pennichuck Water Works to compel the City of Nashua to provide responses to certain discovery requests is, to the extent not already moot, **DENIED**.

By order of the Public Utilities Commission of New Hampshire this seventh day of August, 2006.

Thomas B. Getz
Chairman

Graham J. Morrison
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary